Megah Kepong Sdn Bhd & Anor v Persatuan Penganut Dewa Su Lim Kong Kepong, Kuala Lumpur & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7–22–1725 OF 2004

SM KOMATHY JC
2 DECEMBER 2013

Civil Procedure — Bill of costs — Taxation — Getting up fee — Appeal against award of senior assistant registrar — Getting up for same work done for three defendants — Whether defendants solicitor entitled to claim three times over as getting up for same work done — Whether unsuccessful litigants oppressed by having to pay excessive amount of costs — Rules of the High Court 1980 O 59 rr 34(1), 35(3) & 36

The first plaintiff who was the registered owner of three pieces of land ('the said lands'), had given the second plaintiff the rights to develop the said lands into the development known as Taman Megah Kepong II. Meanwhile, the first defendant, a Taoist temple registered under the Societies Act 1966, occupied a portion of the said lands. The second to the tenth defendants were office bearers and trustees in the first defendant. The eleventh defendant is an individual who occupies a portion of the said lands. The present suit was instituted against the defendants to evict them from the said lands. An injunction was also sought to restrain the defendants from occupying the same. The plaintiffs also sought supplementary relief for special and general damages to be assessed as against each and every defendant, with the second to the tenth defendants being sued in their capacity as office bearers of the first defendant at the material time. The plaintiffs' application for an injunction against the defendants was dismissed with costs. The defendants' application to strike out the plaintiffs' claim on the ground that the plaintiffs had failed to comply with s 9(c) of the Societies Act 1966 was allowed with costs. The first, the second and the ninth defendants separate bills of costs were taxed by the senior assistant registrar ('SAR') who awarded each of the defendants a sum of RM70,000 as getting up fees. The plaintiffs being dissatisfied with the amount awarded, applied for the award to be reviewed by the SAR on the ground that the amount awarded was excessive as the defendants were represented by the same solicitor. Upon reviewing the award, the SAR confirmed it. Hence, the plaintiffs applied for the judge to review the award of the SAR. The particular question that arises in this taxation review proceedings was whether a solicitor is entitled to be paid getting up fees ten times over for the same work because the ten defendants

represented by him in the present action have won the case brought against them by the plaintiffs.

Held, dismissing the appeal with no order as to costs:

(1) A solicitor who represents two or more litigants in separate actions would be entitled to the same amount as getting up though the same work done in each case. However, the exception to this rule applies when these separate actions were consolidated. In the context of the present case, there was only one action that the plaintiffs had commenced against the 11 defendants herein. And, if it was applied to the facts of this case, it would necessarily preclude the defendants' solicitors from claiming payment ten times over for the same work done. Hence, the defendants were not entitled to claim three times over as getting up for the same work done. It was imperative to ensure that an unsuccessful litigant should not be oppressed by having to pay an excessive amount of costs (see paras 24–25).

(2) The same objection that the defendants were only entitled to claim for getting up fees in relation to one defendant had been taken and rejected thrice. These were decisions that could have been challenged on appeal, but this was not done. No explanation had been proffered for this omission. In the absence of an explanation, it would be reasonable to assume that the plaintiffs do not dispute the correctness of those decisions. Against this backdrop, and to avoid inconsistent decisions on the same issue, this court is unable to accede to request made on behalf of the plaintiffs for the reduction of the amount awarded as getting up fees. It would be unjust to deny the first, the second and the ninth defendants the same quantum of costs awarded to the other defendants in this action (see para 27).

[Bahasa Malaysia summary

Plaintif pertama yang merupakan pemilik berdaftar tiga bidang tanah ('tanah tersebut'), telah memberikan plaintif kedua hak untuk memajukan tanah tersebut menjadi pembangunan yang dikenali sebagai Taman Megah Kepong II. Manakala, defendan kedua, kuil Tao berdaftar di bawah Akta Persatuan 1966, menduduki sebahagian daripada tanah tersebut. Defendan-defendan kedua hingga kesepuluh adalah pemegang jawatan dan pemegang amanah defendan pertama. Defendan kesebelas adalah individu yang menduduki sebahagian daripada tanah tersebut. Guaman ini dimulakan terhadap defendan-defendan untuk mengusir mereka daripada tanah tersebut. Satu injunksi juga dipohon untuk menghalang defendan-defendan daripada menduduki tanah tersebut. Plaintif-plaintif juga memohon relief tambahan untuk ganti rugi khas dan am untuk ditaksir terhadap setiap seorang daripada defendan, yang mana defendan-defendan kedua hingga kesepuluh disaman dalam kapasiti mereka sebagai pemegang jawatan kepada defendan pertama

pada masa matan. Permohonan plaintif-plaintif untuk injunksi terhadap defendan-defendan telah ditolak dengan kos. Permohonan defendan-defendan untuk membatalkan tuntutan plaintif-plaintif atas alasan bahawa plaintif-plaintif telah gagal untuk mematuhi s 9(c) Akta Persatuan 1966 adalah dibenarkan dengan kos. Bil-bil kos defendan-defendan pertama, kedua dan kesembilan dikenakan cukai oleh penolong kanan pendaftar ('PKP') yang telah memberi award setiap defendan sejumlah RM70,000 sebagai fi permulaan. Plaintif-plaintif tidak berpuas hati dengan jumlah yang diawardkan telah memohon agar award itu dikaji oleh PKP atas alasan bahawa jumlah yang diawardkan itu adalah berlebihan kerana defendan-defendan telah diwakili oleh peguam cara yang sama. Setelah mengkaji award itu, PKP telah mengesahkannya. Justeru, plaintif-plaintif telah memohon agar hakim mengkaji award PKP itu. Persoalan khusus yang timbul dalam prosiding semakan pencukaian ini adalah sama ada peguam cara berhak mendapat bayaran fi permulaan sepuluh kali ganda untuk kerja yang sama kerana sepuluh defendan-defendan mewakili olehnya dalam tindakan ini telah memenangi kes yang dimulakan terhadap mereka oleh plaintif-plaintif.

Diputuskan, menolak rayuan tanpa perintah terhadap kos:

(1) Peguam cara yang mewakili dua atau lebih litigan dalam tindakan-tindakan berasingan berhak kepada jumlah sama sebagai permulaan meskipun kerja sama telah dilakukan untuk setiap kes. Walau bagaimanapun, pengecualian kepada peraturan terpakai apabila tindakan-tindakan berasingan tersebut disatukan. Dalam konteks kes ini, hanya satu tindakan yang telah dimulakan oleh plaintif-plaintif terhadap 11 defendan di sini. Dan, jika ia terpakai kepada fakta kes ini, ia semestinya akan mengecualikan peguam cara-peguam cara defendan-defendan daripada menuntut bayaran sepuluh kali ganda untuk kerja sama yang dilakukan. Justeru, defendan-defendan tidak berhak menuntut tiga kali ganda untuk permulaan kerja sama yang dilakukan. Adalah imperatif bagi memastikan bahawa litigan yang gagal tidak ditindas dengan perlu membayar jumlah kos yang berlebihan (lihat perenggan 24–25).

(2) Bantahan yang sama bahawa defendan-defendan hanya berhak menuntut fi permulaan berkenaan seorang defendan telah diambil kira dan ditolak tiga kali. Keputusan-keputusan tersebut yang boleh dicabar atas rayuan, tetapi tidak dilakukan sedemikian. Tiada penjelasan diberikan untuk peninggalan ini. Tanpa apa-apa penjelasan, adalah munasabah untuk menganggap bahawa plaintif-plaintif tidak mempertikaikan kesahan keputusan-keputusan tersebut. Berlatarkan ini, dan untuk mengelakkan keputusan-keputusan yang tidak konsisten berhubung isu yang sama, mahkamah ini tidak dapat bersetuju dengan permohonan yang dibuat bagi pihak plaintif-plaintif untuk pengurangan jumlah yang diawardkan sebagai fi permulaan. Adalah tidak adil untuk

menafikan defendan-defendan pertama, kedua dan kesembilan kuantum untuk kos yang sama diawardkan kepada defendan-defendan lain dalam tindakan ini (lihat perenggan 27).]

Notes

For cases on taxation, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1960–1964.

Cases referred to

Aw Yong Wai Choo v Arief Trading Sdn Bhd & Anor [2001] 5 MLJ 526; [2001] 1 CLJ 816, HC (refd)
Gooi Hock Seng v Chua Guat Khim [2001] 1 CLJ 583, SC (refd)
Mucklow v Same 9 ER 163 (1854) 9 Ex 384 (refd)

Legislation referred to

Rules of the High Court 1980 O18 r 19(1)(a), (c), (d), O 59, O 59 rr 34(1), 35(3), 36, 36(1)
Societies Act 1966 s 9(c)

Nor Akhfa bt Jalal (Mahathir Abdullah with her) (Abdul Aziz Chen & Co) for the plaintiffs.
Ng Chek (Ng Chek & Co) for the defendant.

SM Komathy JC:

[1] The particular question that arises in this taxation review proceedings is whether a solicitor is entitled to be paid getting up fees ten times over for the same work because the ten defendants represented by him in the present action have won the case brought against them by the plaintiffs.

[2] On 25 April 2012 the learned senior assistant registrar allowed a sum of RM70,000 each as getting up fees in favour of the first, second and the ninth defendants, inter alia, on the ground that the other defendants to this action have been awarded the same amount for this item. The first and second plaintiffs applied to review the amount allowed by the learned senior assistant registrar pursuant to O 59 r 36(1) of the Rules of the High Court 1980 ('RHC').

THE BACKGROUND FACTS

[3] In order to appreciate the arguments taken on behalf of the parties, I set out the background facts leading to the first, second and ninth defendants filing their separate bils of costs for taxation. The first plaintiff is the registered owner of the three pieces of land held under Lot 415, Geran Mukim 5911

(previously EMR 4862). Lot 416, Geran Mukim 5910 (previously EMR 4861) and Lot 417, Geran Mukim 5912 (previously 6082) in Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the said lands').

[4] The second plaintiff was given the rights to develop the said lands into the development known as Taman Megah Kepong II.

[5] The first defendant is a Taoist temple registered under the Societies Act 1966 and occupies a portion of the said lands. The second to the tenth defendants were office bearers and trustees in the first defendant. The eleventh defendant is an individual who occupies a portion of the said lands.

[6] The present suit was instituted against the defendants seeking their eviction from the said lands with an injunction to restrain the defendants from occupying the same. In addition, the plaintiffs sought supplementary relief for special damages in the sum of RM7.46m and general damages to be assessed as against each and every defendant, with the second to the tenth defendants being sued in their capacity as office bearers of the first defendant at the material time.

[7] The plaintiffs applied for an injunction against the defendants which was subsequently dismissed with costs.

[8] The defendants then applied to strike out the plaintiffs' claim under O18 r 19(1)(a), (c) and (d) of the RHC on the ground that the plaintiffs had failed to comply with s 9(c) of the Societies Act 1966 in instituting this action. This provision expressly deals with the manner in which a litigant can bring an action against a registered society. On 19 August 2005, the said application was allowed with costs. The claim against the defendants, including the first, the second and the ninth defendants was consequently struck out.

[9] The first, the second and the ninth defendants then each filed three separate bills of costs that related to taking instructions to file defence, dismissal of the plaintiffs' application for an injunction and the striking out of the plaintiffs' claim.

[10] On 25 April 2012, the three bills of costs were taxed by the senior assistant registrar who awarded each of the defendant RM70,000 as Getting up fees. The plaintiff being dissatisfied with the amount awarded, applied for the award to be reviewed by the senior assistant registrar in accordance with O 59 r 34(1) of the RHC. The review was sought on the ground that the amount awarded was excessive as the defendants were represented by the same solicitor. Upon reviewing the award on 17 July 2012, the senior assistant registrar confirmed it.

[11] In accordance with O 59 r 35(3) of the RHC, the plaintiffs requested the reasons for the senior assistant registrar's decision on the review and applied for the judge to review the award of the senior assistant registrar pursuant to O 59 r 36 of the RHC.

[12] In her grounds of decision, the senior assistant registrar explained that she confirmed the quantum awarded as the case involved complex issues and was guided by the similar awards made in favour of the other defendants to this action, which awards had been confirmed on appeal.

ITEMS OF BILLS OBJECTED TO BY THE PLAINTIFFS

[13] The plaintiffs have filed this appeal against three specific items appearing in the respective bills of costs, which are:

First defendant

(a) Item No 57, Scale of Costs (O 59 RHC 1980) matter No 26 - sum awarded RM20,000.00

(b) Item No 58, Scale of Costs matter No 26 - sum awarded RM25,000.00

(c) Item No 59 & 60, Scale of Costs matter No 26 - sum awarded RM25,000.00

Second defendant

(a) Item No 47, Scale of Costs (O 59 RHC 1980) matter No 26 - sum awarded RM20,000.00

(b) Item No 48, Scale of Costs matter No 26 - sum awarded RM25,000.00

(c) Item No 49 & 50, Scale of Costs matter No 26 - sum awarded RM25,000.00

Ninth defendant

(a) Item No 36, Scale of Costs (O 59 RHC 1980) matter No 26 - sum awarded RM20,000.00

(b) Item No 37, Scale of Costs matter No 26 - sum awarded RM25,000.00

(c) Item No 38 & 39, Scale of Costs matter No 26 - sum awarded RM25,000.00

The items claimed for by the respective defendants appear to be in respect of identical areas of work and are as follow:

First defendant (Item 57). Second defendant (Item 47). Ninth defendant (Item 36)

Taking instructions in respect of the plaintiffs' writ of summons and statement of claim weighing the facts and the law, filing a defence, entering into correspondence

First defendant (Item 58). Second defendant (Item 481 Ninth defendant (Item 37)

Taking instructions in respect of the plaintiffs' injunction application, weighing the facts and the law, entering into correspondence

First defendant (Item 59 & 60), Second defendant (Items 49 & 50). Ninth defendant (Item 38 & 39)

Taking instructions in respect of the defendants' applications under O 18 r 19 (1)(a) and (c), weighing the facts and the law, entering into correspondence

THE APPLICABLE LAW

[14] The principles applicable to taxation review proceedings under O 59 r 36 are well settled by a series of authorities. It would suffice to quote a passage in the judgment of Abdul Malek Ahmad FCJ in *Gooi Hock Seng v Chua Guat Khim* [2001] 1 CLJ 583 on the subject. His Lordship quoted with approval a passage in *Malaysian Court Practice High Court* Vol 1 as to when a review under O 59 r 36 of the RHC will be allowed at p 588:

> The phrase 'as the circumstances require in r 36(5) confers on the judge a discretion which is to be judicially exercised. The judge should not interfere with the registrar's decision unless there is an error of principle or some other material error and for this purpose, a broad overview of the matter should be taken.
>
> Hence, the hearing before the judge is not a rehearing but is a review: *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester & Ors (no 2)* [1993] 1 SLR 542.
>
> The court will not interfere with the decision of the taxing registrar upon a mere question of quantum if the taxing registrar has exercised his discretion after consideration of all the circumstances and if no question of principle arises.
>
> It is only when the taxing registrar's decision has been exercised on some wrong principle or the quantum allowed is obviously wrong that the judge will interfere: *Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146; [1973] 1 LNS 143.

DECISION

[15] As stated at the outset, there are eleven defendants to this action. It is common ground that on 9 April 2010, Zabariah bt Mohd Yusof J confirmed the award of the senior assistant registrar awarding the tenth defendant herein getting up fees amounting to RM70,000 for the same three items. It is also

common ground that on 19 August 2011, John Louis O'hara J confirmed similar awards made in favour of the fifth and seventh defendants. Equally, it is not in dispute that Su Geok Yiam J on 19 July 2012 also confirmed similar awards made in favour of the third to the sixth defendants. Each of the defendants was thus awarded RM70,000 as getting up fees.

[16] Counsel for the plaintiffs submitted that the first to the tenth defendants (apart from the fourth defendant) have been represented by the same set of solicitors and filed in essentially identical defences, took essentially identical objections to the plaintiffs' application for injunction, and filed essentially identical applications to strike out the plaintiffs' suit. In the premises, any award of costs ought to take into account the above facts to avoid multiplication and escalation of costs. He contended that in assessing the quantum that ought to be awarded to the first, second and ninth defendants, the senior assistant registrar had completely and without justification, disregarded the costs already awarded to the third, the fifth, the sixth, the seventh, the eighth and the tenth defendants. It was said that in so doing, she had erred in the exercise of her discretion. As a result, the quantum of overall costs against the plaintiffs has become a sum which is grossly disproportionate to the work undertaken for the defendants by the solicitors.

[17] In this context, counsel for the plaintiff pointed out that as the other defendants have all been awarded the same quantum of costs individually for the same three items, the total amount of costs awarded against the plaintiffs' in this suit is a staggering RM630,000. He urged the court to reduce the amount awarded by the senior assistant registrar to a reasonable figure, taking into account the facts as set out in para 12 to arrive at a more equitable award of costs globally.

[18] In response, counsel for the defendants pointed out that the same submission had been unsuccessfully taken by the plaintiffs before the three judges who had heard and dismissed their appeals on quantum on the costs awarded to the other defendants. It is argued that the plaintiff is barred from raising the same issue again based on the doctrine of issue estoppel.

[19] In the alternative, it is contended that there is no rule that prohibits a solicitor who represents two defendants from claiming the same charges on behalf of each defendant. In support of this proposition, he alluded to *Oppenshaw v Whitehead*, *Mucklow v Same 9 ER 163* (1854) 9 Ex 384 and *Aw Yong Wai Choo v Arief Trading Sdn Bhd & Anor* [2001] 5 MLJ 526; [2001] 1 CLJ 816.

[20] The facts in *Oppenshaw* were as follows. Two actions were brought and won on substantially the same ground by two plaintiffs who were injured by the

bursting of a boiler belonging to the owner. The plaintiffs were both represented by the same counsel. When the plaintiffs submitted their respective bills of costs to be taxed, the taxing master refused to tax each bill separately on the ground that the counsel was not entitled to be paid twice over for the same work. On review to the Court of Exchequr, Pollock C B disagreed and ruled in favour of the plaintiffs as there had been no consolidation of the two cases. He enunciated the rule as follows:

> In these cases, rules nisi were obtained to review the taxation of the master, which had been made on the principle that there had been the same attention and care expended or labour bestowed in preparing the briefs, the same attorney being concerned for the plaintiffs in both cases. We certainly are very desirous, if it were possible, to make any arrangement that would be productive of economy in the administration of justice; but upon considering the case with the greatest attention, we find it impossible to lay down any rule that shall lead to that, without creating more litigation and more expense in discussing the application of it than, probably, money would be saved by the adoption of any such rule; and we are of the opinion that where the business is actually done, the master ought not to take into consideration that the same attorney was employed by two parties, unless there is a consolidation. If there is a consolidation, that may make all the difference; but, if the business is really done, although there are two causes, and the same attorney be employed by both parties, we think that there is no ground for reducing the ordinary and fair charge which an attorney may make against his client in each case.

[21] Counsel for the defendant pointed out that the rule enunciated in *Oppenshaw* was approved and applied in *Aw Yong*. He urged the court to apply the rule and confirm the amount awarded to his clients as the other defendants have been awarded the same amounts as getting up fees.

[22] It is convenient at this point to necessary to examine the case of *Aw Yong* which provides the foundation for the point taken. In that case, the plaintiffs instituted 36 separate suits in the Kuala Lumpur High Court against the first and second defendants. The plaintiffs were purchasers who had entered into sale and purchase agreements with the first defendant, who was a housing developer. The second defendant was the registered owner of the property. The 36 suits were consolidated just before the commencement of the trial at the request of the trial judge. After a full trial, the consolidated claim was allowed with costs against both the defendants. The plaintiffs then filed their bill of costs claiming a sum of RM180,000. The deputy registrar confined the plaintiffs' claim for getting up to only one suit and allowed a sum of RM50,000 as getting up fees. James Foong J (as he then was) in confirming the order of the deputy registrar, said at p 531:

> When there is a consolidation of cases for the purpose of economizing time and effort, then correspondingly the cost for getting up must be reduced and confined to only points of law and matters raised at the hearing of the consolidated cases. It

> should not be repeated to each of the consolidated cases, otherwise there would be a multiplicity of awards for the same amount of work and effort spent. This, I believe, is the rational of Pollock CB in *Mucklow v Whitehead and Openshaw v The Same* where a distinct exception to awarding separate costs for two actions where the subject matter litigated was substantially similar where there 'is a consolidation. When such an event (consolidation) has occurred, the work involved in looking up and researching on the law must be confined only to matters raised at the hearing of the case. It would be unfair to punish a defeated party by awarding costs for getting up in each of the consolidated cases when matters were heard only at one hearing; no greater amount of work and effort were expanded on others.

And His Lordship continued on the same page:

> Admitting that though this may be logical, Mr Yau has explained that the consolidation in this case was only effected at the last minute, just before the trial began. By then, all necessary preparations on researching the law had been completed for each case. I find this argument is without justification. Firstly, as illustrated above, no greater effort was expanded on looking up the same points of law which were applicable to all the cases since the relief claimed by all plaintiffs were similar and arose out of the same transaction or series of transactions.

[23] An examination of the case shows that it does support the proposition taken by the defendant, that there is a rule which permits a solicitor who represents two or more litigants in separate actions, to be entitled to the same amount as getting up though the same work was done in each case. The exception to this rule applies when these separate actions are consolidated. In *Aw Yong*, court applied the exception and the plaintiffs were allowed to claim getting up fees in respect of only one action as the 36 actions had been consolidated and treated as one action.

[24] In the context of the present case, it is important to note that there is also only one action that the plaintiffs have commenced against the eleven defendants herein. In the circumstance the exception to the general rule would apply. And, if it is applied to the facts of this case, it would necessarily preclude the defendants' solicitors from claiming payment ten times over for the same work done.

[25] I therefore agree with the submission advanced by counsel for the plaintiff that the defendants are not entitled to claim three times over as getting up for the same work done. It is imperative to ensure that an unsuccessful litigants should not be oppressed by having to pay an excessive amount of costs.

[26] I would like to mention in passing, though the issue does not arise here, that I am not inclined to agree with the view expressed in *Oppenshaw* that a solicitor is entitled to be paid twice over for the same work done by him where there is no consolidation of the separate actions. It is difficult to discern any

justification whatsoever for this rule and does not accord with the rule that costs should not include a punitive element.

[27] Despite my view that the defendants' solicitor is only entitled to be paid for work done in respect of one of his clients, I have no option but to dismiss the plaintiffs' application for review. The same objection that the defendants are only entitled to claim for getting up fees in relation to one defendant has been taken and rejected thrice. These were decisions that could have been challenged on appeal, but this was not done. No explanation has been proffered for this omission. In the absence of an explanation, it would be reasonable to assume that the plaintiffs do not dispute the correctness of those decisions. Against this backdrop, and to avoid inconsistent decisions on the same issue, I am unable to accede to request made on behalf of the plaintiffs for the reduction of the amount awarded as getting up fees. It would be unjust to deny the first, second and ninth defendants the same quantum of costs awarded to the other defendants in this action.

CONCLUSION

[28] For the aforesaid reasons, I dismiss the appeal with no order as to costs

Appeal dismissed with no order as to costs.

Reported by Ashgar Ali Ali Mohamed